IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 1284

EDNA F. STONESIFER and JOSEPH N. STONESIFER, her husband,

Petitioners,

vs.

CARL J. SWANSTROM, LOUIS H. HAMMERSTROM, individually, and as executor of the last will and testament of Lillian F. Swanson, deceased, GEORGE F. ANDERSON, EDITH B. SLUTZ, DONALD P. SLUTZ, RUTH BARRE, DENZIL BARRE, and CHICAGO CITY BANK AND TRUST COMPANY, an Illinois banking corporation,

Respondents.

PETITION FOR ISSUANCE OF THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

CHARLES R. AIKEN,
77 West Washington Street,
Chicago 2, Illinois.
Counsel for Petitioners.

UNITED STATES LAW PRINTING CO., PHONE LAKEVIEW 6581, CHICAGO, ILL.

SUBJECT INDEX.

Table of Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

NO. _____

EDNA F. STONESIFER and JOSEPH N. STONESIFER, her husband,

Petitioners,

vs.

CARL J. SWANSTROM, LOUIS H. HAMMERSTROM, individually, and as executor of the last will and testament of Lillian F. Swanson, deceased, GEORGE F. ANDERSON, EDITH B. SLUTZ, DONALD P. SLUTZ, RUTH BARRE, DENZIL BARRE, and CHICAGO CITY BANK AND TRUST COMPANY, an Illinois banking corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

Your petitioners respectfully represent as follows:

Preliminary Statement.

By this petition the Supreme Court is called on to decide: (1) whether a court of appeals in an equity pro-

ceeding may refuse to review the evidence and is bound by the findings of fact made by the trial court; (2) whether a court of appeals might decline to follow the local practice regulating the burden of proof in a case where State law is the controlling rule of decision; and, (3) whether a court of appeals can affirm a judgment without passing upon assignments of reversible error properly presented for review.

I.

Matter Involved.

Petitioners sued by virtue of diversity citizenship in the District Court for Northern Illinois to rescind an executory agreement. The contract stipulated that the conveyance of an apartment building and a cash gift to petitioners from their deceased mother be abrogated and directed distribution of her estate contrary to the terms of her will. The property settlement was procured by petitioners' stepfather through the executor of their mother's will and his attorney, the respondents here, for the benefit of such fiduciaries.

By their complaint, petitioners asked in separate counts for a cancellation of the contract because of fraud practiced by the fiduciaries and on the ground there was a total failure of consideration. The fiduciaries answered denying the charges, and the cause was referred to a master in chancery for hearing.

State law is the controlling rule of decision in this case, and in Illinois a contract between fiduciaries is presumptively fraudulent. The Illinois decisions lay down the rule that when a transaction between fiduciaries is attacked the burden of proof devolves upon the defending beneficiary

to establish by clear and convincing evidence that the bargain is free from fraud and was entered into with full knowledge by the complainant, after independent advice, and upon adequate consideration.

The master refused to follow the State law and held according to the Federal rule that the burden of proof was upon him who brought the suit to show fraud affirmatively. By his report the master found "that the allegations set forth in the bill of complaint are not supported by adequate proof" (R. 1036), and recommended "that the bill of complaint should be dismissed for failure of material allegations contained therein" (R. 1038).

During the course of the trial, the master excluded documentary evidence and testimony, bearing vitally on the issues of fraud and consideration, offered by the plaintiffs erroneously charged with the burden of proof. After his rejection of plaintiffs' proof, the master found that there was "not sufficient evidence" to support charges made in the complaint (R. 1037).

The chancellor upheld the master, finding by his decree merely "that the material allegations contained in said complaint have not been proved and are not sustained by the evidence" (R. 1058), and dismissed the complaint for want of equity (R. 1062).

Petitioners prosecuted an appeal to the Circuit Court of Appeals for the Seventh Circuit assigning as reversible error the master's refusal to follow the Illinois rule that the burden of proof was upon the fiduciaries, not upon petitioners, and challenging the propriety of the trial court's finding that there was insufficient evidence to sustain the charges of fraud made in the complaint. Also

urged as ground for reversal of the decree was the master's exclusion of plaintiff's offered proof.

The court of appeals affirmed the decree, but in its opinion stated: "As to Swanson, the stepfather . . . we think a finding in favor of the plaintiffs as to him would have been supported by the evidence." The court held, however, that its function was not to review the evidence and that it was bound by the findings of the trial court. The court said its "respect" for "the trier of facts" made it "impossible" for the court "to disturb the findings".

The court of appeals in its discussion of the case points out that the circumstances "strongly support" the plaintiff's claims, but then observes that it is not "satisfied" that it would be "warranted" in disturbing the trial court's findings, thus effectively upholding the view of the master and the chancellor that the burden of proof was upon the plaintiffs instead of the defendants.

The court of appeals refused to notice the contentions advanced by the appellants relative to the exclusion of evidence and completely ignored their claims as to a total failure of consideration.

II.

Jurisdictional Basis.

A.

Issuance of the writ of certiorari upon this record is authorized by section 240 of the Judicial Code (28 U. S. C., sec. 347a).

The judgment sought to have reviewed was rendered by the Circuit Court of Appeals for the Seventh Circuit af-

firming a decree entered by the District Court for Northern Illinois dismissing petitioners' complaint for equitable relief. Section 240 of the Judicial Code provides in pertinent respects: "In any case, civil or criminal, in a circuit court of appeals, . . . it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, . . . to require by certiorari, . . . that the cause be certified to the Supreme Court for determination by it . . ."

B.

The judgment presented for review was rendered by the court of appeals on January 4, 1945 (R. 1105). The reviewing court below denied a timely petition for rehearing on February 19, 1945 (R. 1147). This petition with supporting brief and record having been filed with the Clerk within three months after February 19, 1945, the application is made in time. (*National Labor Relations Board* v. *Mackay Radio Co.*, 304 U. S. 333.)

III.

Questions Presented.

A.

Did the court of appeals properly refuse to review the facts in an equitable proceeding, and was the appellate court correct in considering itself bound by the trial court's findings of fact?

B.

Did the court of appeals wrongly decline to follow the rule of the Illinois courts designating which party bears the burden of proof in a proceeding to set aside a transaction between fiduciaries for fraud?

The Illinois decisions hold that the burden of proof is upon the defendant to establish an absence of fraud by clear and convincing evidence. The reviewing Court below followed the federal rule that the party asserting the affirmative of an issue has the burden of proving it, and the onus was placed upon plaintiffs to establish that the defendants were guilty of the fraud charged in their complaint.

Subdivisions of this inquiry are:

(1) Is burden of proof a matter of substance, or is it a procedural question?

(2) Even if it be merely a procedural right does the federal view as to burden of proof apply where State law is the controlling rule of decision?

C.

Did the court of appeals satisfy the fundamental requirements of a judicial review in affirming the judgment without examining and considering assignments of reversible error properly preserved and presented for determination.

IV.

Reasons for Allowing the Writ.

The following special and important reasons for granting a review and for the exercise of the Court's discretionary consideration are presented upon this record.

A.

The ruling of the court of appeals in this case is in conflict with the decision of another circuit on the same matter.

In the case at bar, a suit in equity, the reviewing court below held:

> "As to Swanson, the stepfather . . . we think a finding in favor of the plaintiffs as to him would have been supported by the evidence."

Yet, the court of appeals refused to reverse the decree dismissing plaintiffs' complaint. The court explained its action on the ground it could not review the evidence but was bound by the trial court's findings of fact. It said:

> "This is not a trial *de novo*. The respect which we entertain for findings made by the trier of facts, who has had the opportunity of seeing and hearing the parties, makes it impossible for us to disturb the findings here made."

Upon this subject, the Circuit Court of Appeals for the Eighth Circuit held in *Aro Equipment Corp.* v. *Herring-Wissler Co.*, 84 F. 2d 619, as follows (p. 621):

> "An appeal in equity brings before the appellate court the whole record, and the court is required to examine the record and try the case *de novo*. The findings of the trial court, while entitled to great weight, may be adopted or discarded by the appellate court even though supported by substantial evidence."

Earlier, the Sixth Circuit had passed upon this matter in the following way (*Laursen* v. *Lowe*, 46 F. 2d 303, 304):

> "In an equity appeal the obligation is imposed upon this court of reviewing the record, weighing the evidence, and determining as best we may whether the plaintiff has sustained the burden of proof resting upon him."

B.

The circuit court of appeals in the instant case has decided a federal question in a way that conflicts with an applicable decision of this Court.

The master found that the plaintiffs had not sustained the fraud charged in their complaint by adequate proof. The chancellor found that the allegations of the complaint had not been sufficiently proved. These rulings were challenged in the court of appeals as placing the burden of proof upon the plaintiffs whereas the Illinois rule cast the burden of proof upon the defendants. The reviewing court found that the evidence supported the charges made in plaintiffs' complaint, but held:

> "We are not satisfied that the evidence warrants or justifies our disturbing the findings of the master confirmed as they are by the District Court."

Thus the court of appeals sanctioned the view of the master and chancellor that the Illinois rule did not apply and that the federal practice of requiring the party who asserted the affirmative of an issue to prove it governs, and placed the onus of establishing fraud upon the plaintiffs.

This Court in *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, was asked to determine whether a circuit court of appeals had properly applied the federal law instead of the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claimed legal title as a bona fide purchaser. Contrary to the ruling by the court below in this case, it was held in the *Dunlap* case that the Texas law raising a presumption as to the validity of the recorded legal title was a substantial right rather than a mere matter of practice in courts of equity, and that the State rule of evidence was controlling.

C.

In deciding the case at bar, the circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

To discharge the burden of proof cast upon them by the master at the trial, the plaintiffs offered in evidence a letter written by their deceased mother relative to the gifts she had made of her property. This document was found by the stepfather's lawyer when he opened the decedent's safe deposit box and was used by the attorney in advising the deceased's daughters as to their rights. The master rejected this proof and the chancellor overruled exceptions to the ruling. Exclusion of this probative instrument was assigned as reversible error and argued in the circuit court of appeals, especially in view of the master's adverse findings being limited to "the facts and circumstances submitted as evidence" (R. 1037).

In like manner testimony fully establishing the validity of decedent's cash gift to petitioners was offered and rejected, and assigned as error on appeal.

Neither of the contentions urged as to the impropriety of the trial court's refusal to admit this evidence was even noticed by the court of appeals in its determination of the cause. Also, the appellate court below completely ignored appellants' contention that there was a total failure of consideration to support the contract. It was stated in the opinion that there was only one ground urged for a reversal.

Thus, in effect, the reviewing court refused to reverse a wrong judgment under the admitted evidence and affirmed

the decree while declining to consider assignments of reversible error properly presented for decision.

The Supreme Court in *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 795, reversed a judgment upon the sole ground that it was affirmed by the court of appeals "without referring to or considering the assignments of error relating to the rulings of the court in the progress of the trial".

This failure by the court of appeals to pass upon important questions presented upon a sufficient record constitutes a substantial deprivation of the petitioners' statutory right of review and ought not be approved. Such departure from the customary practice in the appellate function amounts to an impairment of the federal judicial process which should prompt the exercise of this Court's supervisory power.

Prayer.

Wherefore, petitioners pray that a review of the decision by the circuit court of appeals in this cause, and of its rulings and its refusal to rule as hereinbefore pointed out, may be granted, and that the writ of certiorari may issue in this behalf.

Respectfully submitted,

CHARLES R. AIKEN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinion.

The opinion rendered in this cause by the Circuit Court of Appeals for the Seventh Circuit is set forth in full at pages 1100 to 1104 of the transcript, and is reported in Volume 146 of the Federal Reporter, second series, at page 671 (*Stonesifer* v. *Swanson,* 146 F. 2d 671).

Jurisdiction.

The judgment sought to have reviewed was entered by the court of appeals on January 4, 1945, and a rehearing in that court was denied February 19, 1945. This application is made within the statutory period of three months thereafter.

A full statement of the jurisdictional basis is set out in the petition proper.

Statement of the Case.

The deceased, Lillian Swanson, died testate December 4, 1941, leaving a substantial estate. She was survived by her three daughters, Edna, Edith and Ruth, and by their stepfather, Carl Swanson. A year before her death the deceased had conveyed an apartment building to Edna and Edith, and shortly prior to her decease she made them a gift of $17,000 in cash. By her will decedent bequeathed the rest of her property to Edna and Edith. She left a letter in her safe deposit box explaining the division of her personal property between Edna and Edith and her

disinheritance of Ruth, and describing her arrangements with their stepfather as to certain property.

Immediately after his wife's death, Carl Swanson informed his stepdaughters Edna and Edith that he and their mother had an understanding that each would relinquish all claims to the other's property in order that their respective estates would go to their children free of the dower interest of the other. Swanson insisted, however, under threat of a repudiation of his agreement with their mother, that Edna and Edith retain his attorney, George Anderson, to handle their mother's estate.

Thus persuaded, Swanson's stepdaughters retained Anderson to represent them. Swanson's lawyer thereupon advised Edna and Edith that their stepfather's agreement with the deceased could not be enforced because it was not in writing. Anderson further advised Swanson's stepdaughters that the conveyance by their mother of the apartment building was legally defective and that her gift to them of the $17,000 in cash was invalid.

On the strength of these representations, Anderson procured a contract from Edna and Edith stipulating that the apartment building and the $17,000 were to be turned over to the executor as assets of their mother's estate, and that the estate properties were then to be divided between Swanson, the stepfather, and all three daughters. A further provision of the agreement obtained by Anderson called for an outright gift from Edna and Edith of their half interest in a twelve flat building to their stepfather.

After signing the contract but before its performance, Swanson's stepdaughters consulted an attorney of their own choosing and were advised for the first time as to the

fraudulent character of the agreement. Petitioners promptly filed their complaint in the District Court asking a rescission of the contract between them and their stepfather.

By their complaint, petitioners charged Swanson with fraudulently procuring the settlement agreement through misrepresentations and deceit and by virtue of his fiduciary relationship with them; petitioners further alleged that the contract was brought about through a conspiracy between Swanson, Anderson and Ruth to cheat and defraud them. In a separate count it was averred that there was no consideration to support the agreement.

After issue joined, the cause was referred to a master in chancery for hearing and determination. At the trial the master ruled that the plaintiffs bore the burden of proving their charges of fraud against Swanson, Anderson and Ruth, and of establishing the failure of consideration. In attempting to discharge the onus thus cast upon them, petitioners offered in evidence their mother's letter found by Anderson in her safe deposit box, and also testimony to establish the $17,000 gift. The master excluded the offered proof in each instance. Then, after denying the admission of this evidence, the master ruled that the burden of proof being upon the plaintiffs their complaint should be dismissed for lack of sufficient evidence before him. The master's rulings and recommendations were approved by the chancellor, and a decree was rendered dismissing the cause for want of equity at plaintiff's costs.

Petitioners prosecuted an appeal to the Circuit Court of Appeals for the Seventh Circuit contending that the cause should be reversed because: (1) the master and chancellor erroneously threw the burden of proof upon the plaintiffs instead of the defendants as required by the Illinois law; (2) there was abundant evidence in the record to

sustain the charges of fraud and lack of consideration; (3) the trial court should have admitted the decedent's letter into evidence and should have accepted the proof offered to establish the $17,000 gift.

The court of appeals affirmed the decree, even though holding that the record would have supported a finding in favor of plaintiffs as to their stepfather, Swanson. Its explanation for such extraordinary action was that this appeal was not a trial *de novo* and the court could not review the evidence but was bound by the findings of the master.

Despite the several assignments of error properly presented upon the record, and argued before the reviewing court, it is recited in the opinion below that there was only one contention made by appellants: that the agreement should be rescinded because reached through breach of fiduciary relationships.

In its determination of this cause, the court of appeals refused to notice or consider in any way the claim advanced by the appellants that there was no consideration to support the contract. The court also completely ignored the assignments made that reversible error was committed in excluding the decedent's letter and in rejecting the proof offered to establish the $17,000 gift.

Errors Relied On.

I.

The court of appeals erred in holding that it could not examine or weigh the evidence but was bound by the trial court's findings of fact upon appeal from a proceeding in equity.

II.

The court of appeals erred in declining to follow the applicable Illinois law placing the burden of proof upon the defendants and in upholding the trial court's ruling that the plaintiffs must sustain the burden of proof.

III.

The court of appeals erred in affirming the judgment without examining or noticing assignments of reversible error properly presented for determination by the appellants.

ARGUMENT.

May It Please the Court:

A.

An Appeal In Equity Brings Before The Reviewing Court The Whole Record And The Appellate Court Is Required To Examine The Evidence And Try The Case De Novo.

One of the five errors assigned upon this record for a reversal of the decree is as follows (R.1078):

> "The chancellor erred in finding that the material allegations of the complaint were not sustained."

Perhaps the most important factual issue upon the trial involved the $17,000 gift. As to this question the court of appeals stated in its opinion:

> "The master found there was not sufficient evidence to establsh a valid gift at this time to Edna and Edith
>
> . . .
>
> "There is a conflict in the evidence as to the condition of her mother at the time she gave the direction to Edith to go to the bank and take this money and divide it with her sister Edna. A witness for defendants testified that while her mother was in a coma, Edith, on her own impulse and to save the estate from possible tax, went to the bank and withdrew the money. On the other hand, Edith testified that she acted under her mother's direction, *and the surrounding circumstances strongly support her statement.*" (Italics supplied.)

Another vital issue at the trial concerned the presence or absence of consideration to support the contract. The

recited consideration for the settlement was that Ruth "agrees not to contest the validity of said will" (R. 23). Plaintiffs claimed that there was no foundation for Ruth to contest her mother's will, and as stated in Ruling Case Law (vol. 28, wills, sec. 397, p. 391):

> "If there is no doubt of the validity of the will, a promise to forbear contesting it is not a valuable consideration."

Relative to this point, the court of appeals in its opinion said:

> "As to the sister, Ruth . . . she had been disinherited and she threatened to contest the admission of her mother's will. *It is rather clear that there was not much support, if any, for her contest.*"

Then, with reference to our general assignment that the trial court was in error in finding that the complaint should be dismissed for failure of proof, the court of appeals held:

> "As to Swanson, the stepfather, . . . we think a finding in favor of the plaintiffs as to him would have been supported by the evidence."

Nevertheless, in the face of its findings that the surrounding circumstances strongly supported plaintiffs' claims, and that there was no substance to the consideration relied on to sustain the contract, and that the complaint had been proved as to the stepfather and principal defendant, the court of appeals refused to reverse the judgment. Its explanation for this extraordinary result is that it was powerless to weigh the evidence on appeal and was bound by the findings of the trial court. In this respect the court said:

> "This is not a trial *de novo*. The respect which we entertain for findings made by the trier of facts, who has had the opportunity of seeing and hearing the parties, makes it impossible for us to disturb the findings here made."

On this identical question, as to the scope and extent of the appellate court's reviewing power in an equity appeal, the Circuit Court of Appeals for the Eighth Circuit decided exactly to the contrary. In *Aro Equipment Corp.* v. *Herring-Wissler Co.*, 84 F. 2d 619, the Eighth Circuit held (p. 621):

> "An appeal in equity brings before the appellate court the whole record, and the Court is required to examine the record and try the case *de novo*. The findings of the trial court, while entitled to great weight, may be adopted or discarded by the appellate court even though supported by substantial evidence."

In an earlier decision, the Sixth Circuit determined this point in the following manner (*Laursen* v. *Lowe*, 46 F. 2d 303, 304):

> "In an equity appeal the obligation is imposed upon this court of reviewing the record, *weighing the evidence*, and determining as best we may whether the plaintiff has sustained the burden of proof resting upon him." (Italics supplied.)

Which Circuit has pronounced the correct rule in respect of this important right of review? We think the Eighth and Sixth Circuits are right and that the Seventh Circuit is wrong. In any case, this conflict of decisions between the Circuits should be resolved by granting a consideration of this record, and the resulting impairment of uniform decision adjusted and removed.

B.

Burden Of Proof Is A Substantive Rather Than Procedural Right And Governed By State Rather Than Federal Law.

This action was a suit in equity to rescind an executory contract for fraud and failure of consideration. The complaint charged that the defendants occupied fiduciary re-

lationships with the plaintiffs, and that the settlement agreement was procured by the fiduciaries for their own benefit.

In this connection the court of appeals stated:

> "It is plaintiffs' contention that the settlement agreement should be set aside because it was reached through a breach of fiduciary relationships which existed between the executor, the stepfather and the attorney for the executor, and the two daughters who allegedly suffered by this agreement . . . We accept for the purpose of this argument the plaintiffs' theory that there existed a fiduciary relationship between the stepfather and the daughters; also, between the executor, the executor's attorney, and the legatees, the two daughters."

The established law of Illinois applicable to such a proceeding casts the burden of proof upon the defendants to show an absence of fraud on their part by clear and convincing evidence. In the case of *Kosakowski* v. *Bagdon*, 369 Ill. 252, a leading decision on the subject, the Illinois Supreme Court laid down the following rule (p. 254):

> "The law seems well settled in this State that where relations of trust and confidence exist between parties to a transaction and the party receiving the transfer is thereby benefited, the court will indulge in the presumption that the party making the transfer was unduly influenced, and such presumption will prevail until it is rebutted by the party benefited . . . The doctrine repeatedly announced is that courts of equity will scrutinize with the most jealous vigilance transactions between parties occupying fiduciary relations toward each other, and that the burden of proof is on the beneficiary, in such a case, to establish the fairness of the transaction, and to show that it did not proceed from undue influence . . . We have often held that where a fiduciary relation exists and gives cause for suspicion, it is not necessary to prove actual fraud in order to vitiate a questioned action."

To the same effect see the following decisions handed down by the Illinois Supreme Court at its September, 1944, term: *Le Blanc* v. *Atkins*, 387 Ill. 360, 366-367; *Vrooman* v. *Hawbaker*, 387 Ill. 428, 435; *Burroughs* v. *Mefford*, 387 Ill. 461, 465.

The master in chancery refused to follow the Illinois practice but applied the Federal rule, that the party asserting the affirmative of an issue has the burden of proving it (*Florida Fruit Canners* v. *Walker*, 90 F. 2d 753, 758; *Tucker* v. *Traylor Co.*, 48 F. 2d 783, 786). The burden of proving the fraud charged in the complaint was thus thrown upon the party asserting it. In consequence of this placement of the burden of proof upon plaintiffs, the master found (R. 1036-1038):

> "The allegations set forth in the Bill of Complaint are not supported by adequate proof . . . Plaintiffs have failed to prove a failure of consideration . . . The evidence submitted before me fails to establish either a prenuptial agreement or a postnuptial agreement . . . There is not sufficient evidence to establish a valid gift . . . The evidence fails to establish that Ruth Barre, George F. Anderson and Carl J. Swanson combined and confederated themselves in a scheme to cheat and defraud either plantiffs or any other person or persons of their lawful property . . . The Bill of Complaint should be dismissed for failure of proof of material allegations contained therein."

The chancellor found merely (R. 1058):

> "That the material allegations contained in said complaint have not been proved and are not sustained by the evidence."

Error in this regard was assigned upon the record in the following way (R. 1079, 1082):

> "The chancellor by ratifying, confirming and ap-

> proving the master's report fell into the following errors of the master . . . The master erred in failing to find that Swanson, Anderson and Hammerstrom had not sustained the burden cast upon them in this case to establish the fairness of the transaction and it did not proceed from any influence on their part, and that it was executed by plaintiffs only after obtaining competent, independent advice, and that they failed to vindicate the bargain from any shadow of suspicion and show that it was perfectly fair and reasonable in every respect by clear and convincing proof."

The court of appeals by its opinion sustained the master and chancellor in declining to follow the Illinois law with reference to burden of proof. The reviewing court below said:

> "We are not satisfied that the evidence warrants or justifies our disturbing the findings of the master confirmed as they are by the District Court....We cannot say there was no support for the findings as made."

There can be no doubt that the act of artificially throwing the burden of proof upon one party instead of the other can readily be the turning point in litigation. Outcome of the case at bar can be completely accounted for on that ground. Instead of casting it on the defendants where it belonged, the master placed the burden of proving defendants' fraud on the plaintiffs and then dismissed their complaint for failure to discharge that burden which was not lawfully theirs. This ruling by the master substituting the Federal rule for the State practice was upheld by the chancellor and affirmed by the court of appeals.

Under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, it would seem that this type of presumption, a creature of law and not of logic, should be regarded as

substantive rather than procedural, and governed by State rather than by Federal law. It has been so declared in at least one circuit court of appeals decision, with respect to sufficiency of proof to raise an inference of negligence and make out a *prima facie* case of liability under the doctrine of *res ipsa loquitur* (*Coca-Cola Bottling Co.* v. *Munn*, 99 F. 2d 190).

Nothing in the new Rules of Civil Procedure indicates an intention to give any direction concerning either presumptions or the burden of proof (*Howard* v. *United States*, 125 F. 2d 986). It would seem, therefore, that the entire field is left to State law.

In *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, this Court was called upon to decide whether a circuit court of appeals had wrongly declined to follow the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claims the legal title as bona fide purchaser. The Texas rule was that burden of proof is upon him who attacks the legal title and asserts a superior equity. The Court there said (p. 210):

> "The District Court ruled in favor of Dunlap. The Circuit Court of Appeals affirmed. In the latter court petitioner maintained that under the established Texas rule, on an issue of *bona fide* purchaser for value without notice, the burden of proof is upon him who attacks the legal title and asserts a superior equity. It cited *White* v. *Hix* (Texas) 104 S. W. 2d 136, and insisted that *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, required observance of the local rule . . .
>
> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land

may confidently rely. Petitioner was entitled to the protection afforded by the local rule."

Analogously, the rule of Illinois that in an action against fiduciaries attacking a transaction for fraud the burden of proof devolves upon the defendant to establish the negative of the fraud charged against him, is a substantial right upon which plaintiffs in bringing their action in the case at bar could confidently rely. Plaintiffs were entitled to the protection of the Illinois law, and the lower courts in the instant case wrongfully applied the federal rule requiring him who asserts the affirmative of an issue to sustain the burden of proving it.

This conflict between the ruling by the appellate court below and an applicable holding of this Court ought to justify a review of the record to the end that conformance with a governing Supreme Court decision may be effected.

C.

A Court Of Appeals May Not Affirm A Judgment Without Giving Consideration To Reversible Errors Properly Presented For Review.

After the master ruled that the burden of proof was not upon the defendant fiduciaries but must be sustained by the plaintiffs, petitioners in attempting to discharge the burden thus thrown upon them offered in evidence a letter written by the deceased explaining her disposition of the property involved in this litigation. This document was found by the stepfather's lawyer in decedent's safe deposit vault while handling her estate and is of the highest probative value in establishing the fraud of the fiduciaries. In this connection the following transpired at the trial (R. 734-743):

"Mr. Pomerance: If the Master please, I wish at this time to have exhibit No. 2, which is a letter that was found in the safety deposit box, which I believe your Honor admitted into evidence subject to my objection . . . My motion now is to have that particular letter, which was admitted into evidence, subject to my objection, to have the objection sustained to the letter and have the letter removed as a document in evidence

"The Master: Excluded.

"Mr. Aiken: Entirely?

"The Master: Entirely.

"Mr. Aiken: You mean even though—

"The Master: It is out.

"Mr. Aiken: Even not as being what you admitted it to be in the first place—to show it was a document that George Anderson found in the safety deposit box, which has been referred to by all of these witnesses?

"The Master: That is right."

In this condition of the record the master by his report ruled against the plaintiffs on the following stated ground (R. 1037):

"The evidence *submitted before me* fails to establish either a prenuptial or a postnuptial agreement between Carl J. Swanson and his deceased wife, Lillian F. Swanson."

The District Court approved the Master's ruling and finding (R. 1058), and this disposition was assigned as error in the Circuit Court of Appeals as follows (R. 1079, 1084-1085):

"The chancellor by ratifying, confirming and approving the Master's Report fell into the following errors of the Master, and committed error in adopting the following rulings of the Master:

"The Master committed palpable, manifest and inexcusable error in excluding from the evidence a letter written by decedent to her daughters concerning various transactions in issue and left by her in an en-

velope addressed to her daughters and found by Anderson when he opened the decedent's safe deposit box as attorney for plaintiffs and read by him to the parties and upon which Anderson based much of his advice to the parties (Plaintiffs' Exhibit 2a, b, c—(transcript 184-188; transcript 1429-1447), which offered and excluded letter is as follows:

'September 24, 1940.

'To my daughters Edna, Edith and Ruth

'I wish to make Edna and Edith my heirs. Ruth is out and she has broken my heart, so I feel her choise is to take care of herself, so thats her pick.

'Edna and Edith, you are to divide equally between yourselfs, and its upon to you if you wish to give Ruth anything. The 2 flat is in Ediths name, and you can do as you wish with it but please dont make enemys between yourselfs. I just bought a $5000.00 bond in the 12 flat, so your share is equall with Carl. Have Louis and Harry help you in case anything happens to me. My personal belongings you can do so you please. The piano I want Edith to have.

'I have taken Ruth name off my box so she is out as far as Im concerned. She has hurt me so that I'll never get over it, but girls keep an eye on her so if she needs help be back of her.

'Edith can have my automobile.

'This is awful hard to write this out. I just can't see any other way out at the present. Hope you girls enjoy the little I leave you and be happy with your lovly husbands, my son in laws. Words will never be able to express how I love them. Wish I could say that about Ruth.

'Love Mother' ''

At another point in the proceedings the plaintiffs sought to prove the gift of $17,000 (R. 602-604) which evidence the master rejected (R. 601-602. In his report the master found (R. 1037):

> "*That from the facts and circumstances submitted as evidence before me* concerning the withdrawal of the $17,000 on December 1, 1942, prior to the death of Lillian F. Swanson, *there is not sufficient evidence* to establish a valid gift to Edna F. Stonesifer and Edith B. Slutz."

Again, the District Court upheld the master's ruling (R. 1058). The disposition of this matter in the trial court was assigned as error in the appellate court below in the following manner (R. 1085):

> "The Master committed error in refusing to permit plaintiffs to prove the facts and circumstances surrounding the $17,000. transaction between Edith Slutz and the decedent and in denying plaintiffs' offer of proof by Edith Slutz as follows:
>
> > 'My mother became ill with a kidney infection and complications during the last week of November, 1941, and she telephoned me in Highland Park asking me to come out and stay with her while she was sick, which I did. I stayed with mother constantly, helping out and being with her during her illness. After I had been staying with mother for several days, the doctor decided that her condition was so serious that she should be removed to the hospital. A day or so before mother left for the hospital, she called me to her bedside and told me that she had $17,000. in cash in her safety deposit box from some insurance which my father had left her. Mother said she had always planned for Edna and me to have this money, that she was going to the hospital and she was afraid she was not coming back. She said, "I want to give this $17,000. to you and Edna equally. You already are a deputy and can go into my safety deposit box. The keys to the box are in the back of my dresser drawer. I want you to take the keys and go down to the vault and take the money out of the box right away, and give half of it to Edna and take half of it for yourself."

'A day or so later, on Saturday, November 29, 1941, I went to the bank in accordance with mother's instruction, but the vaults were closed. On the following Monday, December 1, 1941, I returned to the vaults and took the $17,000. in cash out of mother's box. I opened another box in my own name right there in the vault, and I divided the money into two equal shares, placing $8,500. in an envelope on which I marked "Edna," and I took the other half of the cash and placed it in a second envelope upon which I marked "Edith," and I put both envelopes in the safe deposit box which I had opened. Before I left the Continental Bank Building, I decided I ought to stop in and tell my uncle, Louis H. Hammerstrom, who is the Chief Auditor of the Bank, about mother's condition, which I did. While I was there I told Uncle Louie about removing the $17,000. from mother's box.' "

The court of appeals affirmed the decree dismissing plaintiffs' complaint for insufficient evidence without even noticing, much less considering, these errors assigned for reversal (R. 1100-1104).

In its opinion the appellate court below said as to the appellants' contentions merely:

> "Generally and broadly stated it is plaintiffs' contention that the settlement agreement should be set aside because it was reached through a breach of fiduciary relationships which existed between the executor, the stepfather and the attorney for the executor, and the two daughters who allegedly suffered by the agreement."

The reviewing court's grievous oversight was called to its attention thusly by the petition for a rehearing (R. 1128):

> "Your Honors still have not passed upon our contention that the Master committed reversible error in

rejecting as evidence the mother's letter and in excluding Edith's testimony concerning the gift.

"The Master's finding on this point underlines the serious injury to plaintiffs' case which resulted from his erroneous ruling. The Master disposed of the gift question in the following way (R. 1037):

> '*That from the facts and circumstances submitted as evidence before me* concerning the withdrawal of the $17,000 . . . there is not sufficient evidence to establish a valid gift.'

"If the Master had placed the burden where it belonged there would have to be a finding that the gift was not disproved. And if he had not excluded plaintiffs' proof on the subject he would be compelled to find that the gift had been established *by the plaintiff.*"

In *Maryland Casualty Co.* v. *Jones,* 279 U. S. 792, this Court had occasion to pass upon a similar disposition of an appeal in the circuit court of appeals. It was held there that a refusal by the court of appeals to consider the assignments of error relating to rulings at the hearing required a reversal. This Court said (p. 794-796):

> "The court made various rulings adverse to defendant in respect to the admission and exclusion of evidence . . . After the coming in of the report of the special master the court made special findings of fact, upon which it entered judgment against the defendant . . . The defendant filed twenty-one assignments of error. Some of these were directed to . . . the rulings of the court on the admission and rejection of evidence . . . Despite the fact that all of these assignments of error appeared in the record, the Circuit Court of Appeals stated in its opinion that 'all assignments of error are based upon the insufficiency of the testimony to support the special findings' and . . . affirmed the judgment of the District Court without referring to or considering the assignments of error relating to the

> rulings of the Court in the progress of the trial . . . Since on the face of the record the failure of the Circuit Court of Appeals to consider the assignments of error relating to rulings at the hearing is unexplained, and its action appears to have been erroneous, its judgment must be reversed."

As this Court held in the *Maryland Casualty* case, petitioners were substantially deprived of their right of review by the refusal of the court of appeals to consider the rulings in the trial court made during the progress of the hearings, excepted to at the time, and duly presented by the record for determination on appeal.

This radical departure from the usual and accepted course of judicial proceedings in the circuit court of appeals calls for an exercise of this Court's power to supervise the appellate function in the intermediate courts.

Respectfully submitted,

CHARLES R. AIKEN,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1284

EDNA F. STONESIFER AND JOSEPH N. STONESIFER, HER HUSBAND, *Petitioners,*

VS.

CARL J. SWANSON, LOUIS H. HAMMERSTROM, INDIVIDUALLY, AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF LILLIAN F. SWANSON, DECEASED, GEORGE F. ANDERSON, EDITH B. SLUTZ, DONALD P. SLUTZ, RUTH BARRE, DENZIL BARRE, AND CHICAGO CITY BANK AND TRUST COMPANY, AN ILLINOIS BANKING CORPORATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

MATTHIAS CONCANNON,
WILLIAM H. DILLON,
69 West Washington Street,
Chicago 2, Illinois,
Attorneys for Respondents, Louis H. Hammerstrom, individually, and as executor of the last will and testament of Lillian F. Swanson, deceased; and George F. Anderson.

CHESTER W. KULP,
JOSEPH J. SULLIVAN, JR.,
100 West Monroe Street,
Chicago 3, Illinois,
Attorneys for Respondent, Carl J. Swanson.

WILLIAM O. BURNS,
CARL POMERANCE,
135 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Respondents, Ruth Barre and Denzil Barre, her husband.

SUEJECT INDEX.

TABLE OF CASES.

PAGE

TABLE OF CASES (Continued).

OTHER AUTHORITIES.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1284

EDNA F. STONESIFER AND JOSEPH N. STONESIFER, HER HUSBAND,

Petitioners,

VS.

CARL J. SWANSON, LOUIS H. HAMMERSTROM, INDIVIDUALLY, AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF LILLIAN F. SWANSON, DECEASED, GEORGE F. ANDERSON, EDITH B. SLUTZ, DONALD P. SLUTZ, RUTH BARRE, DENZIL BARRE, AND CHICAGO CITY BANK AND TRUST COMPANY, AN ILLINOIS BANKING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

REPORT OF OPINION IN THE COURT BELOW.

The opinion in the Circuit Court of Appeals is set forth in full at pages 1100 to 1104 of the printed record. It will also be found at 146 F. (2d) 671. We shall refer to the opinion as it appears in the printed record.

STATEMENT OF FACTS.

The statement of facts contained in the petition is inaccurate and misleading in many respects and is not supported by any reference to the record. The testimony which was conflicting covers approximately 850 pages of the printed record. (R. 89 to 936.) We do not regard it as necessary to make a separate statement of facts, but would refer the Court to the Master's report, wherein the Master stated the facts in his findings of fact and conclusions and recommendations. (R. 1030-1039.) The settlement agreement appears at pages 941-942 of the record.

ARGUMENT.

A.

The Circuit Court of Appeals reviewed the evidence and found that the evidence sustained the findings of fact.

The third sentence of Rule 52(a) provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a Master to the extent that the court adopts them, shall be considered as the findings of the court."

Petitioners state that the Circuit Court of Appeals held that it could not review the evidence and was bound by the findings of the trial court (see pp. 4 and 7 of petition for certiorari). The Circuit Court of Appeals did not so hold. That Court stated (R. 1102-1103):

> "We accept *for the purpose of this argument* the plaintiffs' theory that there existed a fiduciary relationship between the stepfather and the daughters; also, between the executor, the executor's attorney, and the legatees, the two daughters.
>
> "*So approaching the evidence,* we are nevertheless persuaded that on the issue of a breach of fiduciary relationships *the evidence supports the finding of the master* so far as Anderson, the attorney, and Hammerstrom, the executor, are concerned. It would serve no useful purpose to recite all the testimony, or the major portion of it, bearing on this question. *Suffice it is to say that the evidence not only supports the finding of the master and the District Court, but*

in our opinion, makes any contrary finding quite inconsistent with that portion of the testimony which is clearly established and uncontradicted.

"As to Swanson, the stepfather, the dispute is not so readily disposed of. We think a finding in favor of the plaintiffs as to him would have been supported by the evidence. *On the other hand, we can not say there was no support for the findings as made.* Conceding the fiduciary relationship existed between the stepfather and the daughters and also that the burden was upon the stepfather to show good faith on his part in the dealings which finally culminated in the agreement in question, *we are not satisfied that the evidence warrants or justifies our disturbing the findings of the master confirmed as they are by the District Court.*

"This is not a trial *de novo.* The respect which we entertain for findings made by the trier of facts, who has had the opportunity of seeing and hearing the parties, makes it impossible for us to disturb the findings here made." (Italics ours.)

Surely, this portion of the opinion shows that the Court of Appeals *did* review the evidence, and having reviewed it, determined that the findings of the Master and the District Court were not "clearly erroneous" and sustained those findings. The Court also discussed the evidence concerning other controverted issues and sustained the findings thereon.

Petitioners seek to sustain their contention by picking sentences from the opinion and isolating those sentences from their context. Surely, the last paragraph above quoted read in connection with the paragraphs immediately preceding it is not susceptible of the construction petitioners seek to place upon it.

* * *

Rule 52(a) merely states the practice existing in Federal Courts in reviewing equity cases prior to its adoption (Note of Advisory Committee on Rules, 28 U. S. C. A., following § 723c, pp. 677-8; *District of Columbia* v. *Pace*, 320 U. S. 698, 701, 88 L. Ed. 408, 410); a practice so well settled by many decisions of this Court (*Adamson* v. *Gilliland*, 242 U. S. 350, 353, 61 L. Ed. 356, 357; *Lawson* v. *United States Mining Company*, 207 U. S. 1, 12, 52 L. Ed. 65, 75; *Davis* v. *Schwartz*, 155 U. S. 631, 636, 39 L. Ed. 289, 293) as to need no further pronouncement from this Court. We submit, however, there is no conflict between the Sixth, Seventh and Eighth Circuits. The decisions in each of these Circuits hold that the Circuit Court of Appeals may review the evidence, but may not set aside findings of fact, unless such findings are clearly erroneous.[1]

---

[1] *Sixth*:

Anderson v. *General Am. Life Ins. Co.*, 141 F. (2d) 898, 901, 904;
Green v. *Electric Vacuum Cleaner Co.*, 132 F. (2d) 312, 313;
Andrew Jergens Co. v. *Conner*, 125 F. (2d) 686, 689.

Seventh:

Kerr v. *United States*, 131 F. (2d) 450;
United States v. *62 Packages of Marmola Tablets*, 142 F. (2d) 107, 109;
Wertz v. *National City Bank of Evansville*, 115 F. (2d) 65, 68, cert. den. 311 U. S. 675, 85 L. Ed. 434.

Eighth:

Killoren v. *First Nat. Bank*, 127 F. (2d) 537, 539, 540;
F. W. Fitch v. *Camille, Inc.*, 106 F. (2d) 635, 639;
Kimm v. *Cox*, 130 F. (2d) 721, 741.

B.

Petitioners' argument concerning the burden of proof has no application to this case.

Petitioners cite Illinois cases to the effect that, where one who stands in a position of trust and confidence benefits by a transaction, he has the burden of proof to establish the fairness of the transaction and to show that it did not proceed from undue influence.

It will be noted that two conditions must be present before this rule concerning burden of proof applies, namely: (1) a fiduciary relationship must be established, and (2) the fiduciary must have benefited by the transaction.

As to Hammerstrom and Anderson.

Throughout the petition Anderson is referred to as Swanson's attorney; actually he was attorney for Hammerstrom, the executor (R. 95, 135, 260, 276, 330, 381, 873, 1031). Conceding, for the purpose of this argument, that Hammerstrom, the executor, and Anderson, his attorney, occupied a fiduciary position, it appears that neither one of them was a party to the settlement agreement (R. 941), which is here sought to be set aside, and neither of them benefited in any way by that agreement. Consequently, the rule contended for by petitioners cannot apply to Hammerstrom or Anderson.

Furthermore, the Master found that the settlement agreement was a good, valid and binding agreement and "was not induced by reason of fraud, collusion or breach of any fiduciary relationship on the part of Anderson, Swanson or Hammerstrom, or either of them," and that said agreement was executed by all of the parties thereto of their own free will and accord (R. 1036). The Master

further found that neither Hammerstrom nor Anderson at any time practiced actual or constructive fraud (R. 1037, 1038). These findings were expressly confirmed by the District Court (R. 1058).

At the conclusion of the hearing before the District Court the presiding Judge stated:

> "I wonder why this lawsuit was ever brought." (R. 938.) * * * "it would appear to me that George Anderson, instead of being condemned, ought to be commended for the part he has taken in this matter," (R. 939) * * *.
>
> "It appears it was entered into openly and willingly and with the full knowledge of all the people who signed that agreement, and there were seven of them. I repeat, again, instead of condemning this man Anderson, I think he should be commended for trying to settle a very difficult problem and which, if it had been settled at that time in that fashion, would have saved much money for all litigants involved in this lawsuit." (R. 940.)

The Circuit Court of Appeals accepted "for the purpose of this argument" petitioners' theory that Hammerstrom and Anderson occupied a fiduciary position, but said: "Suffice it (is) to say that the evidence not only supports the findings of the master and the District Court, but in our opinion, makes any contrary finding quite inconsistent with that portion of the testimony which is clearly established and uncontradicted."

As to Swanson.

Kinship alone is not sufficient to establish a fiduciary relationship (*Dyblie* v. *Dyblie,* 389 Ill. 326, 59 N. E. (2d) 657 (brothers), *O'Malley* v. *Deany, et al.,* 384 Ill. 484, 51 N.E. (2d) 583 (mother and son), *Kosturska* v. *Bartkiewicz,* 241 Ill. 604, 89 N.E. 657 (mother and daughter)).

The Master found that even assuming a confidential or fiduciary relationship existing between Swanson, the stepfather, on the one hand, and his two stepdaughters, on the other, namely, Edith B. Slutz and Edna F. Stonesifer, the evidence submitted "unquestionably demonstrates that such relationship, *if any existed*, was terminated on December 10, 1941, and was not revived prior to January 29, 1942," (R. 1036) the date of the execution of the settlement agreement. The District Court approved the findings of the Master (R. 1058). Consequently, there being no fiduciary or confidential relationship between Swanson and his stepdaughters, the rule contended for by petitioners concerning the burden of proof has no application.

Furthermore, the Circuit Court of Appeals, after reviewing the evidence, said that even conceding a fiduciary relationship existed between Swanson and his stepdaughters, and conceding also that the burden was on Swanson to show the fairness of the transaction, "we are not satisfied that the evidence warrants or justifies our disturbing the findings of the master confirmed as they are by the District Court" (R. 1103).

There is no contention that Ruth Barre occupied a fiduciary position.

In view of the foregoing we do not deem it necessary to discuss whether burden of proof is a substantive right governed by State law or a matter of procedure governed by Federal rules and decisions. Nor do we deem it necessary to discuss whether the rule concerning the burden of proof in the Federal Courts is different from the rule in the State Court.

C.

The excluded evidence was considered by the Circuit Court of Appeals.

The following appears in the opinion of the Circuit Court of Appeals:

> "* * * There was a letter found in her lock box which gave her reasons for this disinheritance." (R. 1101.)
>
> * * *
>
> "* * * There is a conflict in the evidence as to the condition of her mother at the time she gave the direction to Edith to go to the bank and take this money and divide it with her sister, Edna." (R. 1101.)

It is evident that the Court of Appeals, for the purpose of reviewing the evidence, treated the two excluded items of evidence concerning which petitioners complain, as though they were in evidence, but nevertheless determined that the findings of the trial court should not be disturbed. Consequently, it appears that, even if the Master had been in error in excluding the evidence, such error would not be ground for reversal, as the decision would have been the same even though the evidence had been admitted (Rule 61, 28 U. S. C. A., following §723c, p. 730). In view of this, it was needless for the Court of Appeals to decide whether the evidence had been properly excluded.

We submit, however, that the two items of evidence were properly excluded:

1. *The letter from Mrs. Swanson to her daughters.* Petitioners state that this letter "is of the highest probative value in establishing the fraud of the fiduciaries" (p. 23), and then infer that the letter is of importance

in connection with the question of a prenuptial or postnuptial agreement (p. 24). Petitioners failed to explain wherein the letter has any connection with fiduciary relationships or with prenuptial or postnuptial agreements, and we can see no connection. The letter was never delivered; it was found in the mother's safety deposit box after her death (R. 111). The letter has no probative value. It is invalid as a testamentary disposition and, even if it were valid for that purpose, it was revoked by the will executed four and one-half months later (Pltffs'. Ex. 8, R. 959).

2. *Testimony as to purported conversation between decedent and her daughter, Edith Slutz, concerning the $17,000.00, shortly prior to decedent's death.* As to Edith's offered proof of conversation with her mother shortly before her death, the evidence was properly excluded since it was not competent under Section 2 of the Illinois Evidence Act. (Ill. Rev. Stat., 1943, Chap. 51, Sec. 2; *Rothwell* v. *Taylor*, 303 Ill. 226, 230, 135 N.E. 419; *Campbell* v. *Campbell*, 368 Ill. 202, 204, 13 N.E. (2d) 265; *Waugh* v. *Moan*, 200 Ill. 298, 302, 65 N.E. 713.) It is a fact, however, that petitioners had the advantage of Edith's account of this alleged conversation with her mother, since she was permitted to recount it when testifying to a conversation which took place at one of the conferences in Anderson's office (R. 356).

CONCLUSION.

Petitioners state that "the recited consideration for the settlement was that Ruth agrees not to contest the validity of said will." The agreement itself which sets forth the numerous considerations (R. 941), and the finding of the Master (R. 1037) adopted by the trial court that the settle-

ment agreement avoided a multiplicity of suits, belies that statement.

We respectfully submit that the petition for certiorari should be denied. This case has been thoroughly considered by the Master, by the District Court and by the Circuit Court of Appeals. No new or important questions of law are involved. We sincerely believe that the petition fails to present any reason for a review of this case by this Court.

Respectfully submitted,

MATTHIAS CONCANNON,
WILLIAM H. DILLON,
69 West Washington Street,
Chicago 2, Illinois,
Attorneys for Respondents, Louis H. Hammerstrom, individually, and as executor of the last will and testament of of Lillian F. Swanson, deceased; and George F. Anderson.

CHESTER W. KULP,
JOSEPH J. SULLIVAN, JR.,
100 West Monroe Street,
Chicago 3, Illinois,
Attorneys for Respondent, Carl J. Swanson.

WILLIAM O. BURNS,
CARL POMERANCE,
135 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Respondents, Ruth Barre and Denzil Barre, her husband.